Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	]	
	]	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	]	WT Docket No. 96-18
	]	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	]	PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION

Petitioner, Western Maryland Wireless Company (Robert J. and Laurie F. Keller, d/b/a),[1] pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Section 1.429(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.429(a), hereby respectfully seeks reconsideration of the *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-59 (released 24 February 1997), __ FCC Rcd __, 6 CR 2, 62 Fed. Reg. 11,615 (12 March 1997),[2] in the above-captioned rulemaking proceedings, in support whereof, the following is respectfully shown:

Petitioner's request for reconsideration is limited to a single aspect of the *Second Report and Order*, namely, the Commission's announcement that "[a]ll pending mutually exclusive applications for paging licenses filed with the Commission on or before the adoption date of this *Order* will be dismissed." *Second Report and Order* at ¶ 2. The Commission offered very little explanation of or justification for this decision, stating only that such applications were being dismissed "[d]ue to the transition to geographic area licensing." *Id.* at ¶ 6. Beyond that terse statement, the matter is not further discussed until the final ordering clause wherein the Wireless Telecommunications Bureau is given delegated authority to "to dismiss all mutually exclusive paging applications." Id. at ¶ 227.

Petitioner has pending and potentially mutually exclusive applications for 931 MHz facilities comprising a proposed regional CMRS paging system with five locations in western Maryland and nearby

[1] Petitioner is a husband and wife partnership with pending and potentially mutually exclusive applications for 931 MHz facilities comprising a proposed regional CMRS paging system with five locations in western Maryland and nearby portions of West Virginia. *See* footnote 3, below.

portions of West Virginia.[3] These applications were filed in full accordance with the "cut-off" rules then applicable to mutually exclusive applications. Petitioner respectfully submits that the *Second Report and Order*, insofar as it calls for dismissal of otherwise timely and proper pending mutually exclusive applications, violates the applicants' comparative consideration rights under Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), as interpreted by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 90 L. Ed. 108, 66 S. Ct. 148 (1945). The pending mutually exclusive applications were filed under and were subject to either the sixty day cut-off procedures applicable under the previous Section 22.31 of the Commission's Rules, or the thirty-day notice and cut-off group procedures of the current Section 22.131 of the Rules. 47 C.F.R. § 22.131.[4] Either way, the applications were filed pursuant to Commission's established cut-off procedures and the applicable cut-off windows have closed.

Now, however, the Commission moves to dismiss the applications for no reason other than its desire to accept new applications so that it may conduct auctions for the subject spectrum. Potential new applicants for the proposed spectrum auctions are being told, in effect, that the previously established cut-off windows will not be enforced against them. The pending mutually exclusive applications will be dismissed without prejudice to their resubmission in accordance with the spectrum auction rules, but this is little comfort. The pending applicants, who played by the established rules and achieved protected cut-off window status, are now being told that the rules are being changed and that more applicants will be invited to the party. This is not only unfair and inequitable, it is also unlawful.

The proposed dismissal of the pending mutually exclusive applications is violative of the applicants' statutory due process rights. This very issue was recently addressed by the United States Court of Appeals for the District of Columbia Circuit. In two cases, *McElroy Electronics Corp. v. FCC*, 990

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[2] This petition for reconsideration is being timely filed within thirty days of the publication of the *Second Report and Order* in the Federal Register. 47 C.F.R. §§ 1.4(b)(1) & 1.429(d).

[3] FCC File Nos. 35791-CD-P/L-95 (Swallow Falls MD), 35798-CD-P/L-95 (Cumberland MD), 35802-CD-P/L-95 (Morgantown WV), 35806-CD-P/L-95 (Keyser WV), 35808-CD-P/L-95 (Friendsville MD). Due to the unique procedures applicable to 931 MHz paging applications, Petitioner is not certain whether its applications are indeed mutually exclusive with any other filings. To the extent that they are, however, the *Second Report and Order* calls for their dismissal. For the reasons stated in this petition, such dismissal would be contrary to applicable law.

[4] The cut-off rules and procedures were modified and recodified (from 22.31 to 22.131) in the "Part 22 Re-Write" (CC Docket Nos. 92-115, 94-46 & 93-116) such rule changes becoming effective 1 January 1995. Some of the pending mutually exclusive applications were filed prior to and some after the effective date of the modified rules. In both cases, however, the rules protect pending applicants from further mutually exclusive filings after the applicable cut-off window has closed.

F.2d 1351 (D.C. Cir. 1993) ("*McElroy I*") and *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) ("*McElroy II*"), the Court evaluated the Commission's attempts to deal with the transition as it changed the rules and procedures for "fill-in" or "unserved area" cellular applications. A recitation of the pertinent facts of the McElroy cases, and the Court's decisions therein, will make clear that the action proposed by the Commission in this proceeding is equally improper.

Cellular rules provide for the issuance of hybrid applicant-defined / geographic licenses, giving the initial licensee exclusive rights to an FCC-defined market area for a period of five years, thereby affording the initial licensee time to "build-out" its system. The regulations originally provided that, at the end of the five year build-out period, third parties were free to apply for authorizations to fill-in any areas in the market not being served by the initial licensee. The rules further provided that such applications would be processed under a 60-day public notice cut-off window, *i.e.*, to be entitled to comparative consideration with such a fill-in application, any mutually exclusive application must be submitted within 60 days of the public notice announcing the first filed application.

In reliance on these rules, McElroy Electronics Corporation and a few other parties filed fill-in applications in several markets upon the expiration of the applicable five-year for an MSA or an RSA. These applications were listed on public notice as accepted for filing, prompting the timely filing of some mutually exclusive applications from additional parties. Long after the 60 day cut-off window had closed, the Commission dismissed all of these applications on the theory that they were premature, insofar as the Commission had not yet developed specific rules for processing such applications. The Court disagreed, holding that the applications were filed in justifiable reliance on the rules in effect at the time the applications were filed. Accordingly, the matter was remanded to the Commission with instructions to reinstate the fill-in applications. *McElroy I*, 990 F.2d 1351.

In the meantime, the Commission adopted new regulations for what it decided to call "unserved area" applications. There were some marked differences between the new "unserved area" procedures and those that had previously applied to "fill-in" applications. First, the Commission decided to move to a geographic licensing scheme for unserved area filings, so that an application for any portion of an unserved area in a given market would be deemed mutually exclusive with any other application for any

other unserved area in that market, regardless of actual conflict.[5] Under the older rules, fill-in applications were deemed mutually exclusive only if their applicant-defined CGSAs overlapped. Second, the Commission replaced the public notice and 60 day cut-off window procedure with date-specific filing windows to be announced for each market. Third, the Commission decided to use random selection procedures (lotteries) to choose among mutually exclusive applicants. The Commission had not yet made an affirmative determination of what method to use to resolve mutually exclusive applications filed under the older fill-in rules.

Pursuant to these new rules, the Commission accepted numerous unserved area applications, including many for markets in which the fill-in applications at issue in *McElroy I* had been filed. Having now received these newer applications and having scheduled a lottery, the Commission had to decide how to address the Court's mandate to reinstate the older applications. The Commission decided to reinstate the fill-in applications and include them in the scheduled lottery along with the newly-filed unserved area applications. The Court rejected this approach, holding that the fill-in applicants were entitled to the protection of the cut-off procedures with which they had fully complied and upon which they had reasonably relied:

> The notice and cut-off procedure serves the public's interest in administrative finality and prompt issuance of licenses. Furthermore, as against latecomers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in enforcement of the cut-off rules. *Florida Inst. of Tech.*, 952 F2d at 554; *City of Angels*, 745 F2d at 663. To serve these purposes, the court has frequently affirmed the Commission's strict enforcement of its rules. *See Florida Inst. of Tech.*, 952 F2d at 550 (*citing Salzer v. FCC*, 778 F2d 869, 875 (DC Cir 1985)). Moreover, the Commission may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors of a mutually exclusive application. *Reuters*, 781 F2d at 949-51 & n.5.

McElroy II, 86 F.3d at 275.

The situation here is indistinguishable in any significant sense from that addressed in *McElroy II*. Here, as in *McElroy II*, the Commission has before it pending applications that were timely filed in justifiable reliance on established cut-off rules, and the applicable cut-off windows under those rules have closed. Here, as in *McElroy II*, the Commission has moved from applicant-defined service areas to

[5] This is the typical process used by the Commission in geographic licensing. First adopted for cellular lotteries, it serves administrative convenience by avoiding the need to determine mutually exclusivity on an application-by-application basis.

geographic licensing, and has changed the method of choosing among mutually exclusive applicants.[6] Here, as in *McElroy II*, the applications filed pursuant to the new rules would be mutually exclusive with the prior-filed applications and, under the old cut-off rules, untimely. In *McElroy II* the Commission attempted to avoid this dilemma by simply including the old applications in the new lottery. Here the Commission attempts a slightly different approach. It proposes to dismiss the old applications, but to allow those applicants to refile for the future auction. But this distinction is without meaningful difference. The gravamen of the *McElroy II* holding is that those applicants who have relied in good faith on duly adopted public notice and cut-off procedures may not have their justifiable rights and expectations dashed simply because the Commission has decided to change the way it does things in the future. It is thus irrelevant *how* the Commission goes about undermining the applicable cut-off rules, because *any* method of doing so is unlawful.[7]

Petitioner and other applicants with pending mutually exclusive 931 MHz paging applicants submitted their applications in good faith reliance on the applicable public notice and cut-off regulations. The cut-off windows have closed, and these applicants are therefore entitled to have their applications processed without the threat of new mutually exclusive filings. The Commission proposal to dismiss the pending applications simply so that it may accept new applications for an auction flies in the face of the pending applicants' due process rights as enunciated in Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), as interpreted by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 90 L. Ed. 108, 66 S. Ct. 148 (1945) and *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) ("*McElroy II*").

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[6] The Commission may, of course, change the method by which it will choose among the timely filed mutually exclusive applicants. *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987) (upholding the Commission's application of lotteries to mutually exclusive applications that had been filed in anticipation of comparative hearings). But the Commission may not, in the process, negate the cut-off rights of timely filed applicants.

[7] Even if the proposed dismissals were not unlawful *per se*, it would nonetheless be incumbent upon the Commission to explain and justify why it is reaching a decision here that is markedly different from the one it reached in similar circumstances in another matter. Specifically, when recently confronted with precisely the same issue in the wireless cable (MMDS) proceeding, the Commission decided to retain pending mutually exclusive applications on file and to process them under the rules in effect at the time they were filed, even deciding to retain lotteries rather than using the newly-adopted auction procedures. *Report and Order in MM Docket No. 94-131 & PP Docket No. 93-253* (FCC 95-230), 78 RR 2d 856 at ¶¶ 87-93 (1995). Most of the reasons cited by the Commission for its decision there (fairness to the applicants, previous processing delays, potential further delays in processing and implementation of service, etc.) are equally applicable here.

WHEREFORE, the Commission should reconsider that aspect of the *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-59 (released 24 February 1997), __ FCC Rcd __, 6 CR 2, 62 Fed. Reg. 11,615 (12 March 1997), that contemplates dismissal of all pending mutually exclusive applications should be reconsidered. The pending applications should be retained on file and processed without being subjected to any new mutually exclusive applications that would be untimely under the cut-off rules in effect at the time the pending applications were filed.

Respectfully submitted,

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